PUBLIC PROSECUTOR v. TOH AH KEAT

[A.Cr.J. (Hashim Yeop A. Sani J.) January 4, 1977]
[Ipoh — Criminal Appeal No. 22 of 1976]

Criminal Law and Procedure — Statement leading to the discovery of a pistol — Whether admissible — Evidence Act, 1950, s. 27 — Criminal Procedure Code (F.M.S. Cap. 6), s. 113.

In this case on a trial of the respondent for unlawful possession of a pistol and ammunition, the learned President ruled that the whole of the statement by the respondent to the investigating officer leading to the discovery of the pistol and ammunition was inadmissible and therefore the prosecution had failed to establish a *prima facie case.* He held that as section 113 of the Criminal Procedure Code did not give any proviso for the application of section 22 of the Evidence Act therefore a statement under section 27 is not admissible in criminal cases unless a caution has been administered. The Public Prosecutor appealed.

Held: (1) the new section 113 of the Criminal Procedure Code and section 27 of the Evidence Act are separate and distinct provisions and are complementary to one another and each should be given full effect;

(2) the statement relating to the finding of the pistol and ammunition in this case was admissible under section 27 of the Evidence Act;

(3) the facts established together with the statement admissible under section 27 of the Evidence Act were sufficient to form a *prima facie* case and the respondent should be called upon to enter his defence.

Cases referred to:-

(1) *R.* v. *Ramasamy* [1965] A.C. 1; [1965] 1 M.L.J. ix.
(2) *Gurusamy* v. *Public Prosecutor* [1965] 1 M.L.J. 245, 247.
(3) *Tan Hung Song* v. *Rex* [1951] M.L.J. 181.
(4) *P. Kottaya* v. *Emperor* A.I.R. 1947 P.C.
(5) *Public Prosecutor* v. *John Alias Arulappan & Anor.* [1939] M.L.J. Rep. 224; [1939] M.L.J. 291.
(6) *Public Prosecutor* v. *Er Ah Kiat* [1966] 1 M.L.J. 10.

CRIMINAL APPEAL.

Wan Abdul Majid bin Wan Abdul Hamid (Deputy Public Prosecutor) for the appellant.

S. Thevinthiran for the respondent.

Hashim Yeop A. Sani J.: The respondent was charged before the Special President, Sessions Court, Ipoh for unlawful possession of a pistol and unlawful possession of seven rounds of ammunition punishable under section 8 of the Firearms (Increased Penalties) Act, 1971 and section 9(a) of the Arms Act, 1960 respectively. At the close of the prosecution case the respondent was acquitted. The learned President ruled that the whole of the statement by the respondent to the investigating officer leading to the discovery of the pistol and ammunition was inadmissible and this resulted in the prosecution's failure to establish a *prima facie* case.

On the material points the records at page 14 show as follows: —

"At this stage the counsel for the defence objects to the admission of this statement as it is contrary to the provision of section 113 of the Criminal Procedure Code since there has not been any caution administered to the accused before the statement was received by the Investigation Officer.

The counsel argues that the new section 113 of the Criminal Procedure Code repealed the old section 113 which provides an exception that a statement may be admitted under section 27 of the Evidence Ordinance.

The new section 113 Criminal Procedure Code does not allow statement under section 27 of the Evidence Ordinance to be admitted anymore as the section 113 Criminal Procedure Code overrides that section 27 of the Evidence Ordinance.

Prosecuting Officer argues that the statement of the accused is admissible under section 27 of the Evidence Ordinance.

Section 27 of the Evidence Ordinance is still enforced and section 113 Criminal Procedure Code does not preclude the provision of section 27 of the Evidence Ordinance.

Section 113 Criminal Procedure Code does not override section 27 of the Evidence Ordinance and that therefore section 27 is enforceable and that the statement is admissible."

The ruling of the learned President appears at the same page of the records as follows: —

"Court:

This is a criminal case in which the Criminal Procedure Code is the law which provides for the procedure to be followed. The Criminal Procedure Code is in my view overriding provision. Since section 113 does not give any proviso for the application of section 27 of the Evidence Ordinance therefore statement under section 27 is not admissible in criminal cases unless a caution has been administered."

The grounds of the learned President merely amplified this argument. He wrote in his grounds: —

"... Section 113 Criminal Procedure Code as amended has left out subsection (iii) entirely. The provision which enables section 27 and 32(a) of the Evidence Ordinance to operate has now been deleted.... The amendment to section 113 of the Criminal Procedure Code has omitted the proviso which admits the provision of section 27 of the Evidence Ordinance, 1950. This omission is to my mind intentional. With this omission the Criminal Procedure Code now provides its own conditions before a statement of an accused person is rendered admissible. To admit section 27 of the Evidence Ordinance would be nugatory. At the most if at all, section 27 would operate subject to the limits set out under section 113 of the Criminal Procedure Code. In my view the provisions of the Criminal Procedure Code are overriding. Unless it is otherwise provided for, in all criminal proceedings, the provisions of other laws would be subject to the Criminal Procedure Code.... It is clear that this section is far reaching and overrides any other law. Although the Evidence Ordinance is a special law however the Criminal Procedure Code has now specifically provided certain conditions to be complied with before a statement of an accused person could be admissible. This new provision would therefore override the provision of the Evidence Ordinance.... In a sense section 113 of the Criminal Procedure Code is similar to section 27 of the Evidence Ordinance, 1950 in that both sections provide for the admissibility of certain evidence. But whereas section 27 has not set out the limitation in detail section 113 of the Criminal Procedure Code has now put specific limitation to the operation of the section. The limitation set out in section 113 of the Criminal Procedure Code has gone beyond that contained in section 27.... It follows that the provisions of section 113 being the substantive law in respect of criminal proceeding should override the provisions of section 27 of the Evidence Ordinance, 1950. Any statement would therefore be admissible only if the proviso under section 113 of the Criminal Procedure Code is complied with."

The grounds of the learned President can in fact be summarised into the following propositions: —

(1) because he considers that the omission of any mention of section 27 of the Evidence Act in the new section 113 of the Criminal Procedure Code must have been intentional on the part of the Legislature whereas the old section 113(iii) of the Criminal Procedure Code expressly excluded section 27 and section 32(a) of the Evidence Act, he inferred that section 27 has thereby been impliedly repealed;

Alternatively —

(2) because he considers both section 113 of the Criminal Procedure Code and section 27 of the Evidence Act deal with the same subject matter and the former being a

"substantive" law it overrides section 27 of the Evidence Act based on his reading of section 3 of the Criminal Procedure Code; and because the new section 113 of the Criminal Procedure Code overrides section 27 of the Evidence Act the proviso to section 113 must now be read into section 27 of the Evidence Act and therefore any statement sought to be admitted under section 27 must comply with limb (i) (relating to threat, inducement or promise) and limb (ii) (relating to caution) of proviso (a) to section 113 of the Criminal Procedure Code.

Proposition (1) especially would at first glance seem to be attractive. On a careful reading of the two provisions however it cannot in my opinion be said that the mere absence of any mention of section 27 of the Evidence Act in the new section 113 of the Criminal Procedure Code would justify the conclusion arrived at by the learned President. Repeal by implication is not generally favoured by the courts. The courts lean against implied repeal of an earlier law by a later law even if they are on the same subject matter unless the words are so clearly expressed or the intention to repeal exists by necessary implication or the two provisions are so repugnant to each other that it is impossible to harmonise them.

Therefore at the outset we are confronted with some basic questions. Are the two provisions plainly repugnant to each other? Are they really provisions on the same subject matter or are they merely "similar" only in the sense that they both deal with certain types of legal evidence? Statutes are said to be *in pari materia* when they deal with the *same* subject matter. It is not enough that they deal with a *similar* subject matter. These questions can only be resolved by analysing the nature of these provisions.

The Criminal Procedure Code is the law on criminal procedure. Section 3 of the Criminal Procedure Code says that all offences under the Penal Code and all offences under any other law *shall be inquired into and tried* according to the provisions of the Criminal Procedure Code. Section 3 is subject only to such other law as may be enforced *regulating the manner or place* of inquiring into or trying such offences. In other words, the Criminal Procedure Code regulates the procedure in criminal trials and is not a special law on evidence. For evidence the special law is of course the Evidence Act.

The rule as to presumption against implied repeal is sometimes summed up in the phrase *Generalia specialibus non derogant* i.e. general words or provisions do not affect special words or provisions. The later law in this case is the provision of the new section 113 of the Criminal Procedure Code which is a provision in a law of general application to all criminal proceedings whereas the earlier law is section 27 of the Evidence Act which is a special law on evidence applicable to both civil and criminal proceedings. It is to be noted that not only is that the Evidence Act a special law on evidence but that section 27 is a special provision in that Act.

In 1872, sections 148, 149 and 150 of the Indian Criminal Procedure Code were transferred into the Evidence Act of India as sections 25, 26 and 27 respectively. A specific saving provision in regard to section 27 of the Evidence Act was made in section 162 of the Indian Criminal Procedure Code (the equivalent of our old section 113 of the Criminal Procedure Code). This saving provision was however removed in 1898. After a number of conflicting judicial decisions, this saving provision was restored in 1941. In *R.* v. *Ramasamy*[1] the Privy Council had to deal with the corresponding provisions of the Ceylon Evidence Ordinance which had been adopted from India in 1895 and while referring to the history of these provisions Viscount Radcliffe said at page 27 as follows:

"The question is, of course, a difficult one: but their Lordships are of opinion that the correct way to solve it is by applying the maxim of interpretation 'generalia specialibus non derogant.' On the one hand there is the Evidence Ordinance containing a precise and detailed codification of the rules that are intended to govern the admission and rejection of evidence. Among them is this section 27, a well-known rule, which has always been regarded as removing all objections to the statements that it deals with, so far as those objections rest upon misgivings as to the conditions under which such statements have been made. On the other hand there is the Criminal Procedure Code, not primarily concerned with rules of evidence at all but containing regulations for the special procedure of investigations under Chapter XII and manifesting a clear general intention, based on the peculiarities of the procedure, to keep material produced by it out of the range of evidence to be used when a trial takes place. Their Lordships think that they must accept the conclusion that evidence falling within section 27 can lawfully be given at a trial, even though it would otherwise be excluded as a statement made in the course of an investigation under section 122."

Section 27 of the Ceylon Evidence Ordinance is the same as our own section 27 of the Evidence Act and section 122(3) of the Ceylon Criminal Procedure Code is substantially similar to our old section 113(2) of the Criminal Procedure Code.

Even during the period that intervened between 1898 and the restoration of the saving clause the Indian courts frequently had to deal with the problem of the impact of section 162 upon section 27. The balance of authority seems to have been regarded "as inclining in favour of treating section 27 as an exception from section 162, even without any saving words."

In my view it is not correct to say that the new section 113 of our Criminal Procedure Code by reading section 3 thereof overrides section 27 of the Evidence Act. It is also not wholly correct to say that both these provisions deal with the same matter or that they are "similar" provisions. The old section 113 of the Criminal Procedure Code was prohibitive in its terms to prevent the use in evidence of statements made by *any person* to any police officer *during the course of investigation* except for the purpose of proving that such a statement was made. It is true that section 27 and section 32(a) of the Evidence Act were expressly excluded in sub-section (3) of the old section 113 of the Criminal Procedure Code. This was necessary as the words of the old section were prohibitive. The new section 113 of the Criminal Procedure Code, however, is couched in general terms and directory in terms and content and according to it *any statement* shall be admissible whether it amounts to a confession or not or made before or after the person is charged or whether in the course of police investigation or not provided that the condition specified in paragraph (a)(i) and (ii) are complied with relating to inducement, threat or promise and the necessity for administering the caution before the statement is made or soon thereafter.

Section 27 of the Evidence Act however deals with a very special type of statement which even if self-incriminatory is nonetheless admissible under that section provided that the conditions prescribed are strictly complied with. Ong J. (as he then was) said of section 27 in *Gurusamy* v. *Public Prosecutor*[2] that the only purpose of that section is to render self-incriminatory statement admissible if such statement can properly be regarded as information relating distinctly to the fact thereby discovered. Brown Ag. C.J. observed in *Tan Hung Song* v. *Rex*[3] that section 27 of the Evidence Ordinance allows only so much of the information as distinctly relates to the fact discovered to be admitted in evidence. The section he said is not intended to let in a confession generally and not one word more of the information which the accused supplied should be given in evidence than is strictly necessary to show how the fact which was discovered is connected with the accused so as in itself to be a relevant fact against him. The law on section 27 of the Evidence Act was dealt with conclusively by the Privy Council in *P. Kottaya* v. *Emperor*.[4] In that case the statement challenged was, "I stabbed with a spear. I hid the spear in a yard in my village. I will show you the place." The Privy Council held that the whole of the statement was admissible except the first part.

Therefore it can be seen that the limitations governing the admissibility of a statement under section 27 of the Evidence Act are quite different from those governing the admissibility of a statement under the new section 113 of the Criminal Procedure Code.

Another factor which draws apart these two distinct provisions is the nature of protection afforded by each of them. Section 27 of the Evidence Act finds its origin in English Common Law. Cussen J. in *Public Prosecutor* v. *John Alias Arulappan & Anor*.[5] disagreed that the reason for admission under section 27 of the statement is that the discovery of the fact is the guarantee of the truth of the statement. He said that the reason for admissibility is that discovery of the fact is sufficient guarantee or assurance of the voluntary character of the statement. This is evident he said from sections 24, 25 and 26 of the Evidence Ordinance because it is very clear that the principle on which the law considers the question of the admissibility or not of the statement made by the accused is not the truth but the voluntary character of the statement. That according to him is the principle of sections 24, 25, 26 and 27 of the Evidence Ordinance. But if we look at the logic of the limitations prescribed under section 27 of the Evidence Act, it can be seen that the statement is admissible because the fact of discovery *rebuts the presumption of falsity* arising from the probability of it being made as a result of inducement or pressure. The discovery proves that not the whole but some portion of the statement given is true namely so much of the information as led directly and immediately to, or the proximate cause of the discovery. Only such portion of the information is guaranteed by discovery and hence, only such portion of the information is admissible. This reasoning is more readily applied in my opinion to the Indian provision because of the words "provided that" at the beginning of section 27 of the Indian Evidence Act. But in my view the absence of the two words in our section 27 of the Evidence Act does not make any difference if we look at the logic behind the limitations. *Sarkar* on Evidence, 12th Edition, page 294 states as follows: —

"It should be observed in this connexion that under the plain words of section 27 so much of the information given by an accused person whether voluntarily or non-voluntarily, (as section 27 is a proviso not only to sections 25 and 26 but also to section 24) leading to the discovery of a fact may be proved irrespective of whether it is incriminatory or not. The crucial point is that only that portion of the information which relates strictly to the discovery of a fact is admissible and the rest is to be discarded. . . . The reason for rejecting a confession or a self-incriminatory statement to the police obtained by compulsion is that the accused may have been induced to say what is false, but the discovery of a fact as the result of the information even though obtained improperly is quite another thing and what is made relevant under section 27 is fact of discovery itself and nothing more."

Raja Azlan Shah J. (as he then was) had occasion to deal with the question of the "voluntariness" of a confession in *Public Prosecutor* v. *Er Ah Kiat*[6] when counsel in that case said that the information given by the accused to the police officer which led to the discovery of the hand-grenade was not a voluntary statement and counsel also contended that it was a confession given at the end of prolonged custody and prolonged questioning. These facts the counsel contended must be considered to ascertain whether the confession was voluntary. His Lordship at page 10 said: —

"In my opinion that is not a correct statement of the law. It would be sufficient for the present purpose to state a passage from the judgment of Park J. in the case of *Thurtell and Hunt* where he said:

'A confession obtained by saying to the party: 'You had better confess, or it will be the worse for you . . .' is not legal evidence. But, though such a confession is not legal evidence, it is every day practice that if, in the course of such confession, the party states where stolen goods or a body may be found, and they are found accordingly, this is evidence, because the fact of finding proves the truth of the allegation, and his evidence in this respect is not vitiated by the hopes or threats which may have been held out to him.'"

In *Ramasamy's case*[1] the Privy Council said that section 27 envisages a situation in which circumstances themselves vouch for the truth of certain statements made by an accused person, even though they are made in conditions that would otherwise justify suspicion. These are those statements that have led to the actual discovery of a proven fact when the information supplied by the accused has been the cause of the discovery.

Thus what is protected under section 113 of the Criminal Procedure Code is the voluntariness of the statement whereas what really matters under section 27 of the Evidence Act is the guarantee or assurance of the probability of the truth of the statement by the fact of discovery. Therefore, these two provisions clearly cover quite different areas of evidence. They should therefore be regarded as complementary provisions and not conflicting provisions in criminal proceedings.

Finally, an area quite often overlooked in the interpretation of a statute — the intention of the Legislature in amending an existing law. The new section 113 of the Criminal Procedure Code, as the Explana-

tory Statement to the Bill seems to declare openly, is a 'major change' in the law. Unfortunately the Explanatory Statement does not give any further useful information to find the real object of the amendment. The last sentence merely states that the object was "to extend the cautioned statement procedure to all criminal investigations and trials" which is again only a half-truth. It is obvious, however, that the new provision was lifted from section 15(1) of the Prevention of Corruption Act, 1961. It is also obvious in my opinion that the intention of the Legislature was to extend and supplement the powers of investigation towards the procurement of evidence to be used in court. The words 'any statement' and the words following them indicate very clearly the intention to supplement the existing law governing admissible evidence to be used in criminal trials. The inclusion of the proviso is only the manifestation of the accepted standards of the rule of law incorporating sections 24 and 25 of the Evidence Act and the Judge's rules. No reason was disclosed in the Explanatory Statement why the Legislature wanted this 'major change.' But that same objective must have also been the motivation behind the sweeping law of regulation 21 of the Essential (Security Cases) Regulations, 1975, a provision dealing with receivable evidence in the trial of a security case. The Essential (Security Cases) Regulations, 1975 were first published in the *Gazette* on October 4, 1975 and the Criminal Procedure Code (Amendment and Extension) Bill 1975 which brought forth among other things the new section 113 was tabled in Parliament on or about December 11, 1975. These two documents must have been drafted about the same time. To construe therefore that because of the absence of a saving provision for section 27 of the Evidence Act in the new section 113 of the Criminal Procedure Code section 27 is therefore repealed or at least "overridden" would in my view amount to a construction which defeats the object of the Legislature. In my view to give full effect to the object of the amendment the police should be given the opportunity to have recourse to either the old section 113 of the Criminal Procedure Code or section 27 of the Evidence Act depending on the circumstances of the case for otherwise the amendment would serve no useful purpose. The new section 113 of the Criminal Procedure Code and section 27 of the Evidence Act are separate and distinct provisions and are complementary to one another and each should be given its full effect.

The statement which the learned President wrongly ruled as inadmissible was the whole of the following statement which appears at page 13 of the record: —

"He told me that he was having a pistol and that it was an automatic pistol and he was also having 7 rounds of .22 ammunition and this pistol was hidden in a heap behind some houses in Pasir Pinji and that he would take me to that place."

Applying *Kottaya's case*[4] it is obvious that the last limb of the statement i.e. "this pistol was hidden behind some houses in Pasir Pinji and that he would take me to the place" is definitely admissible as being a statement within the purview of section 27 of the Evidence Act.

The facts of the case are briefly as follows. The respondent was arrested in Sungei Besar, Teluk Anson and was handed over to the investigating officer (PW2) on October 24, 1975. No one else was arrested with him. During interrogation he made the statement referred to earlier and then led the police party to the spot in Pasir Pinji. The spot was at the foot of a telephone post where there was a small heap of rubbish, stones and mud. According to PW2 the respondent "scattered the earth and dug up the earth and picked up a pistol." In the pistol was a magazine containing seven rounds of .22 ammunition. The pistol was in a brown holster without any cover. The pistol and the ammunition were tested by the armourer, (PW1) and found to be serviceable. PW3 was a detective who acted as interpreter during the interrogation and who also said that the respondent did not have any difficulty in understanding or speaking the Hokkien language being the language used in the interrogation. PW3 also said in evidence that the information was given by the respondent "not very long after questioning". PW4 was another detective who took the three photographs of the spot (page 26 of the record).

The facts established together with the statement admissible under section 27 of the Evidence Act would in my view be sufficient evidence to form a *prima facie* case. It is my view therefore that the respondent should have been called upon to enter his defence to the charges and I now so order. The order of acquittal of the learned President is hereby set aside.

Appeal allowed.

Solicitors: *Thevin, Chandran, Siva & Chong.*

SEPIAH BINTE SULAIMAN v. ABDULLAH BIN MAT AMIN

[O.C.J. (Abdul Razak J.) January 5, 1977]
[Kota Bharu — Civil Suit No. 80 of 1977]

Malay customary law — Harta sepencarian — Presumption.

The plaintiff who was the divorced wife of the defendant claimed as *harta sepencarian* a share in 2 pieces of land at Pasir Mas, Kelantan. The defendant was a padi planter but he denied that the lands were acquired by the joint resources or effort of himself and the plaintiff and claimed that they were inherited from his grandfather.

Held: (1) there is a presumption that if property is acquired during the coverture of the marriage through the joint resources or effort of the parties it is *harta sepencarian*. It can be rebutted by the husband or the wife proving that it was acquired by the sole efforts or resources of one or the other;

(2) in this case on the facts the defendant had not rebutted the plaintiff's claim of *harta sepencarian* and therefore judgment must be given for the plaintiff.

CIVIL SUIT.

Mohamed Dzaiddin Abdullah for the plaintiff.

A. Gomez for the respondent.

Abdul Razak J.: This is an action for *Harta Sepencarian*. The plaintiff was the wife of the defendant who has since been divorced from him. They were married in 1942 till the year 1968. They had no children of the marriage. According to the plaintiff, during its coverture they had acquired 2 pieces